BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JOSE ALBERTO TROLLE	)	
Claimant	)	
VS.	)	
	)	Docket No. 255,283
ENGINEERED AIR	)	
Respondent	)	
AND	)	
	)	
FREMONT COMPENSATION INSURANCE GROUP	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier appealed the preliminary hearing Order dated July 21, 2000, entered by Administrative Law Judge Steven J. Howard.

ISSUES

Judge Howard ordered the respondent and its insurance carrier to provide claimant with a list of three physicians from which claimant could chose one to provide any necessary medical treatment. The issues on this appeal are:

(1) Did claimant provide timely notice of accident?[1]

(2) Did claimant sustain personal injury by accident arising out of and in the course of employment with respondent?[2]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record compiled to date, the Appeals Board finds the Order should be affirmed.

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[1] K.S.A. 44-520.

[2] K.S.A. 1999 Supp. 44-501.

The Workers Compensation Act places the burden of proof upon claimant to establish his right to an award of compensation and to prove the conditions on which that right depends.[3] "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."[4] The Act is to be liberally construed to bring employers and employees within the provisions of the Act but those provisions are to be applied impartially to both.[5]

An accidental injury is compensable under the Workers Compensation Act where the accident arose out of and in the course of employment.[6] The question of whether there has been an accidental injury arising out of and in the course of employment is a question of fact.[7]

Claimant is a Spanish speaking individual. On February 24, 2000, claimant injured his back when the unit he was working on slipped, causing him to fall backwards. He asked a supervisor named Adolfo Villa to translate for him with another supervisor in order to get permission to leave work and get medical treatment. The claimant stated that he told Adolfo that "I was going to make an appointment because I felt as though something had just been torn open in my back."[8]

Respondent denies claimant described his injury as work related and, therefore, denies proper notice was given of an accident arising out of and in the course of employment. Claimant's supervisor, Dan Doudall, testified that he is the person claimant and Adolfo Villa spoke to on the date of the alleged accident. He denies that claimant, through Mr. Villa acting as interpreter, ever said that his injury was work related. However, he did give claimant permission to leave work to see a doctor.

Later that same day respondent's plant superintendent, Brian Ferguson, received a call from Shawnee Mission Medical Center, a local hospital, that claimant was there seeking treatment for a workers compensation injury. Mr. Ferguson testified that the call from the hospital was to ask him whether or not he was "approving a workman's

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[3] K.S.A. 1999 Supp. 44-501(a); *see also* Chandler v. Central Oil Corp., 253 Kan. 50, 853 P.2d 649 (1993) and Box v. Cessna Aircraft Co., 236 Kan. 237, 689 P.2d 871 (1984).

[4] K.S.A. 1999 Supp. 44-508(g). *See also* *In re* Estate of Robinson, 236 Kan. 431, 690 P.2d 1383 (1984).

[5] K.S.A. 1999 Supp. 44-501(g).

[6] K.S.A. 1999 Supp. 44-501(a); Baxter v. L.T. Walls Constr. Co., 241 Kan. 588, 738 P.2d 445 (1987).

[7] Harris v. Bethany Medical Center, 21 Kan. App. 2d 804, 909 P.2d 657 (1995).

[8] Depo. of Jose Alberto Trolle at 24.

compensation claim."[9] He said this "was the first time I ever heard [about] a work related injury."[10] After checking and finding no record of a work related accident, authorization for that treatment was denied.

Although there is a dispute about whether or not claimant described his injury as work related when he asked Mr. Doudall for permission to seek medical treatment, the evidence is persuasive that the injury occurred at work as claimant described. There is no allegation that claimant ever denied his injury was work related. Neither Mr. Villa nor Mr. Doudall asked claimant about the cause of claimant's painful back condition. When claimant arrived at the hospital, even though he had health insurance coverage, claimant reported the injury as "workman's compensation".

The purposes of the notice requirement are primarily to give the employer an opportunity to investigate the facts and to alert the employer to the possibility of an injury, so the employer can provide prompt medical treatment, if necessary, and/or make accommodations to prevent further injury.[11] These purposes were all satisfied in this case. Respondent challenges claimant's credibility because his testimony about exactly what he said to Mr. Villa and Mr. Doudall is inconsistent. But claimant's testimony is not necessary to establish notice. Even if respondent was not alerted to a work related accident by claimant's initial conversations with Mr. Villa and Mr. Doudall, there is no question but that respondent became advised by the telephone call from the hospital later that same day. Such knowledge satisfies the purposes of the notice requirement. Although claimant may have failed to follow respondent's procedures for reporting accidents, the respondent nonetheless had timely knowledge of at least an alleged work related injury. This made the giving of formal notice unnecessary.[12]

After observing the witnesses testify, Judge Howard apparently found claimant's testimony credible, at least on the issue of accidental injury. He impliedly found that Mr. Trolle had an accident at work that caused his low back injury, because preliminary benefits were awarded. Considering the testimony of Mr. Trolle, Mr. Villa, Mr. Dominguez, Mr. Doudall and Mr. Ferguson, together with the medical records in evidence, the Appeals Board agrees. Therefore, the Appeals Board finds and concludes that Mr. Trolle sustained personal injury by accident arising out of and in the course of his employment with respondent and that timely notice of accident was given.

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[9] Preliminary Hearing at 50.

[10] Preliminary Hearing at 58.

[11] *See* Injured Workers of Kansas v. Franklin, 262 Kan. 840, 849, 942 P.2d 591 (1997); *see also* Pyeatt v. Roadway Express, Inc., 243 Kan. 200, 756 P.2d 438 (1988).

[12] *See* Cross v. Wichita Compressed Steel Co., 187 Kan. 344, 348, 356 P.2d 804 (1960); Morgan v. Inter-Collegiate Press, 4 Kan. App. 2d 319, 606 P.2d 479 (1980).

As provided by the Act, preliminary hearing findings are not binding but subject to modification upon a full hearing on the claim.[13]

WHEREFORE, the Appeals Board affirms the Order dated July 21, 2000, entered by Administrative Law Judge Steven J. Howard.

IT IS SO ORDERED.

Dated this ____ day of October 2000.

BOARD MEMBER

c: C. Albert Herdoiza, Kansas City, KS
Donald J. Fritschie, Overland Park, KS
Steven J. Howard, Administrative Law Judge
Philip S. Harness, Director

[13] K.S.A. 1999 Supp. 44-534a(a)(2).